No. 78-1152

In the Supreme Court of the United States

OCTOBER TERM, 1978

RONALD VERGARA, ESTHER RENTERIA, JAIME ALATORRE, individually and on behalf of all others similarly situated,

Petitioners,

vs.

ROBERT E. HAMPTON, Chairman, GEORGIANA SHELDON and L. J. ANDOLSEK, Commissioners, United States Civil Service Commission, and DONALD A. ALEXANDER, Chairman of the Internal Revenue Service,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALAN A. ALOP
ARNOLD S. ROSENBERG
18th Street Neighborhood Legal Services
Legal Assistance Foundation of Chicago
1661 South Blue Island Avenue
Chicago, IL 60608
312 - 421-1900

KALMAN D. RESNICK
Legal Services Center for Immigrants
Legal Assistance Foundation of Chicago
1661 South Blue Island Avenue
Chicago, IL 60608
312 - 226-0173
Attorneys for Petitioners

Of Counsel:
KENNETH MONTGOMERY
Central Pennsylvania Legal Services
10 South Prince Street
Lancaster, PA 17603

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UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Ronald Vergara, Esther Renteria and Jaime Alatorre, on behalf of themselves and all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 24, 1978.

OPINION BELOW

The opinion of the Court of Appeals appears at 581 F.2d 1281, and is attached hereto as Appendix A. The opinion rendered by the District Court for the Northern District of Illinois is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 24, 1978. A timely petition for rehearing *en banc* was denied on October 27, 1978, and is attached hereto as Appendix C. This petition for certiorari was filed within 90 days of the date on which the petition for rehearing *en banc* was denied.

QUESTIONS PRESENTED

1. Whether Executive Order 11935 exceeds the scope of the President's statutory and constitutional authority in barring from non-discretionary federal civil services positions lawful permanent resident aliens, including those who have declared their intent to become United States citizens or who are authorized by Congress to receive compensation for federal employment.

2. Whether Executive Order 11935 violates the Fifth Amendment rights of lawful permanent resident aliens, including those who have declared their intent to become United States citizens or who are authorized by Congress to receive compensation for federal employment.

EXECUTIVE ORDER AND STATUTORY PROVISIONS INVOLVED

Executive Order 11935, 41 Fed. Reg. 37301 (Sept. 2, 1976):

> (a) No person shall be admitted to competitive examination unless such person is a citizen or national of the United States.
>
> (b) No person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States.
>
> (c) The Commission may, as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments.
>
> • • •

United States Code, Title 5:

§3301 Civil Service; generally

> The President may—
>
> (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
>
> • • •

Treasury, Postal Service, and General Government Appropriation Act, 1973, P.L. 92-351, 86 Stat. 471, 487:

> Sec. 602. Unless otherwise specified and during the current fiscal year, no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . whose post or duty is in continental United States unless such person (1) is a citizen of the United States, (2) is a person in the service of the United States on the date of

enactment of this Act, who, being eligible for citizenship has filed a declaration of intention to become a citizen of the United States prior to such date and is actually residing in the United States, (3) is a person who owes allegiance to the United States, or (4) is an alien from Poland or the Baltic countries lawfully admitted to the United States for permanent residence. . . . This section shall not apply to citizens of the Republic of the Philippines or to nationals of those countries allied with the United States in the current defense effort, or to temporary employment in the field service (not to exceed sixty days) as a result of emergencies.

STATEMENT OF THE CASE

This is an action challenging the legality of Executive Order 11935, which restricts application, examination and eligibility for the United States Civil Service to citizens and nationals of the United States. The Executive Order excludes the 4,265,034 lawful permanent resident aliens who live in the United States[1] from applying for hundreds of thousands of federal civil service positions.[2] The petitioners, lawful permanent resident aliens of the United States, seek a declaration of illegality and an injunction against continued enforcement of the Executive Order and refusal to examine, appoint and certify such aliens for employment in the United States Civil Service. The Petitioners have brought this action on behalf of themselves and all other persons similarly situated who are nationals and/or citizens of foreign states living in Illinois who have

[1] U. S. Department of Justice, 1976 *Annual Report: Immigration and Naturalization Service,* Table 34.

[2] In *Hampton* v. *Mow Sun Wong,* 426 U.S. 88, 92 (1976), this Court noted that "about 300,000 federal jobs became available each year . . ."

been lawfully admitted into the United States for permanent residence and who desire to apply and be eligible for appointment in the United States Civil Service.

This lawsuit was originally filed by Petitioner Vergara challenging the validity of the Civil Service Commission regulation, 5 C.F.R. §338.101(a), which barred the employment of aliens in the competitive federal service. On January 30, 1974 the district court dismissed petitioner's complaint and held the regulation was valid. Petitioner Vergara then appealed to the Seventh Circuit Court of Appeals.

On June 1, 1976, 5 C.F.R. §338.101(a), was declared unconstitutional by the Supreme Court of the United States. *Hampton* v. *Mow Sun Wong,* 426 U.S. 88 (1976). Thereafter, on July 14, 1976 the Seventh Circuit Court of Appeals vacated the district court's decision of January 30, 1974 and remanded the cause for further proceedings in conformity with the Supreme Court decision in *Hampton* v. *Mow Sun Wong, supra.* Subsequently, President Ford issued Executive Order 11935 on September 2, 1976. 41 Fed. Reg. 37301. That order provides for the exclusion of aliens from the Civil Service in language very similar to that of the Commission regulation previously declared unconstitutional.

On December 30, 1976, Esther Renteria and Jaime Alatorre were added as plaintiffs and a second amended complaint was filed challenging the validity of Executive Order 11935 on the grounds, *inter alia,* that the Order exceeds the authority granted to the President by Congress in the Civil Service Act, 5 U.S.C. §3301, or by the Constitution and violates the Due Process Clause of the Fifth Amendment of the United States Constitution.

On May 16, 1977 the President's Motion to Dismiss was granted. Subsequently in July, 1977, the District Court issued a Memorandum Opinion and Order denying plaintiffs' motions to certify a class and for summary judgment and granting defendants' motion for summary judgment on all counts.

The Seventh Circuit Court of Appeals on August 24, 1978 reversed the District Court's denial of class certification but affirmed the District Court's decision upholding the validity of the Executive Order. Thereafter, on October 27, 1978, the Seventh Circuit denied petitioners' request for a rehearing.

Petitioner Vergara is a citizen and national of the Philippines who was admitted to the United States in 1972 as a permanent resident alien. On August 27, 1973, in response to an advertisement, he contacted the Internal Revenue Service in Chicago to apply for a position. He was informed by an Internal Revenue Service employee that he was ineligible for employment in that agency because he was not a United States citizen. The following day he contacted the Civil Service Commission in Chicago and was again advised that his alienage rendered him ineligible. The Civil Service Commission refused to give him a job application. Mr. Vergara still wishes to apply and take the examination for a Civil Service position with the Internal Revenue Service. He is also prepared to take an oath of permanent allegiance to the United States as a condition thereto.

Petitioner Renteria, a citizen and national of Mexico, was admitted to the United States as a lawful permanent resident thirteen years ago at the age of twelve. While a senior at a public high school in Chicago, Illinois, Ms.

Renteria took a course designed to prepare students to take the Civil Service examination for office assistant. Although the remainder of the students taking that course were permitted to apply for and take the examination in May, 1972, Ms. Renteria and two other non-citizens in the class were informed that they could not because they were aliens. This information was given by a teacher pursuant to instructions from a Civil Service Commission examiner in Chicago. In November 1976, when she again sought to take the Civil Service examination, Ms. Renteria was told by a Civil Service Commission employee that although she could take the examination, her test would not be graded or considered in hiring due to her lack of United States citizenship. Prior to seeking to take the examination, Ms. Renteria had executed a declaration of intent to become a United States citizen and was willing to take an oath of permanent allegiance to the United States.

Petitioner Alatorre, also a citizen and national of Mexico, was admitted to the United States as a lawful permanent resident nine years ago. He served in the United States Armed Forces for two years and received an honorable discharge. Mr. Alatorre, a carpenter, has substantial experience in his field and has completed a four-year apprenticeship at Washburn Trade School in Chicago, Illinois. As a veteran, he would be entitled to preferential eligibility for appointment to the Civil Service as a carpenter. On December 9, 1976, however, Alatorre inquired about taking the Civil Service examination for carpenter and was given the same response as Petitioner Renteria. Petitioner Alatorre, like Petitioner Renteria, was prepared to take an oath of permanent allegiance to the United States.[3]

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[3] Since the proceedings in the lower courts, named petitioners Esther Renteria and Jaime Alatorre have become United States citizens.

Throughout the proceedings each named petitioner has been fully qualified for a position in the United States Civil Service but for his or her status as a permanent resident alien. All three petitioners have been authorized by Congress to be compensated for employment in the competitive civil service: petitioner Vergara as a citizen of the Philippines, petitioners Renteria and Alatorre as nationals of Mexico, a country allied in the current defense effort,[4] and all three petitioners as permanent resident aliens who have affirmed their willingness to take an oath of permanent allegiance to the United States.[5] Nevertheless, they

[4] As a signatory of the Inter-American Treaty of Reciprocal Assistance (The Rio Pact), September 2, 1947, 62 Stat. 1681, TIAS 1838, (effective December 3, 1948), Mexico, together with twenty other Latin American nations, is considered to be allied to the United States in the current defense effort. See letter, dated April 14, 1978, from Arthur W. Rovine, Assistant Legal Adviser for Treaty Affairs, United States Department of State, to Frank Fuentes, Jr., Chairperson, Employment Task Force, United States Civil Service Commission. App. D.

[5] The classes of aliens authorized by Congress to be compensated for their employment in the federal civil service are set forth in the Treasury, Postal Service, and General Government Appropriation Act, 1973, P.L. 92-351, 86 Stat. 471, 487, § 602 (hereafter "Appropriation Act"), effective at the time the original complaint was filed in this action. The text of this provision appears *supra* at 3-4. This provision has been reenacted in each year since 1973 without pertinent amendment except as noted: Treasury, Postal Service, and General Government Appropriation Act, 1974, Pub. L. 93-143, 87 Stat. 510, § 602; Treasury, Postal Service, and General Government Appropriation Act, 1975, Pub. L. 93-381, 88 Stat. 613, § 602; Department of Defense Appropriation Act, 1976, Pub. L. 94-212, 90 Stat. 153, § 753, amended to add "South Vietnamese refugees paroled into the United States" to the list of aliens authorized by Congress to be compensated for employment in the federal civil service; Department of Defense Appropriation Act, 1977, Pub. L. 94-419, 90 Stat. 1299, § 750; Treasury, Postal Service and General Government Appropriation Act, 1978, Pub. L. 95-81, 91 Stat. 341 § 602.

have been barred from being appointed to positions in the competitive civil service. Similarly, petitioners' class includes thousands of other permanent resident aliens who have declared their intention to become United States citizens, or who are willing to take oaths of permanent allegiance to the United States, or who are from countries whose citizens or nationals are specifically authorized by Congress to receive compensation for employment in the federal civil service, or who have otherwise been authorized by Congress in the Appropriation Acts, *supra,* to be compensated for such employment.

REASONS FOR GRANTING THE WRIT

Introduction

The importance of this case is indicated by the enormous number of individuals and jobs potentially affected, the liberty interest in federal employment asserted, the discreteness and insularity of the minority seeking relief, and the fact that this Court has, in *Hampton* v. *Mow Sun Wong, supra,* already recognized the significance of federal questions similar to these raised in this action. The Executive Order that is the basis of this controversy excludes over four million lawful permanent resident aliens from hundreds of thousands of federal civil service positions. The petitioners, as lawful resident aliens, "pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths,* 413 U.S. 717, 719 (1973). They are, however, subject to a critical disadvantage peculiar to their status: they are politically powerless in that they "are not entitled to vote . . ." *Hampton* v. *Mow Sun Wong, supra,* 426 U.S. at 102.

Moreover, as aliens the petitioners are members of a class which this Court has characterized as "a prime example of a 'discrete and insular' minority . . . from whom . . . heightened judicial solicitude is appropriate." *Graham* v. *Richardson,* 402 U.S. 363, 372 (1971). The denial to them of opportunities for federal civil service employment constitutes a "deprivation of an interest in liberty . . ." resulting in "ineligibility for employment in a major sector of the economy." *Hampton* v. *Mow Sun Wong, supra,* 426 U.S. at 102. Given the Court's acknowledgment in its *Mow Sun Wong* decision of the important questions raised by the total exclusion of aliens from the federal civil service

and given the significance of the serious statutory and constitutional issues presented herein, the Court should grant certiorari.[6]

I.

THE DECISION BELOW RAISES SIGNIFICANT QUESTIONS REGARDING THE STATUTORY AND CONSTITUTIONAL AUTHORITY OF THE PRESIDENT TO BAR VARIOUS CLASSES OF LAWFUL PERMANENT RESIDENT ALIENS FROM NON-DISCRETIONARY FEDERAL CIVIL SERVICE POSITIONS.

The Seventh Circuit, in rejecting petitioners' argument that Executive Order 11935 lacked the requisite congressional authorization, held the order to be authorized by 5 U.S.C. §3301(1) of the Civil Service Act. That provision however, requires each regulation promulgated under the statute to be of a nature that "will best promote the efficiency" of the civil service. 5 U.S.C. §3301(1). An executive order regulating admission to the civil service which does not serve the promotion of efficiency thus cannot be found authorized by 5 U.S.C. §3301(1). In *Hampton* v. *Mow Sun Wong, supra,* this Court specifically found that a blanket exclusion of aliens from the civil service does not promote the efficiency of the service:

> The only concern of the Civil Service Commission is the promotion of an efficient federal service. In gen-

[6] Petitioners concede that there is no conflict among the appellate courts: *Hampton* v. *Mow Sun Wong,* 435 F. Supp. 37, (N.D. Cal. 1977), is now pending before the Ninth Circuit; the D.C. Circuit, in *Jalil* v. *Hampton,* 580 F.2d 701 (unreported dec'n) (D.C. Cir. 1978), ruled only on the issue of a back pay award claimed by an alien who had become a citizen.

> eral it is fair to assume that its goal would be best served by removing unnecessary restrictions on the eligibility of qualified applicants for employment. *Hampton* v. *Mow Sun Wong, supra,* 426 U.S. at 114-15.

As necessarily recognized in *Mow Sun Wong,* civil service efficiency cannot be furthered by reducing the pool of potential applicants through the disqualification of almost five million individuals solely on the basis of their alienage. Executive Order 11935, clearly failing to promote civil service efficiency in any manner, cannot be held authorized by the terms of 5 U.S.C. §3301(1).

The Seventh Circuit based its holding that Executive Order 11935 is authorized by 5 U.S.C. §3301(1) on one sentence in *Hampton* v. *Mow Sun Wong, supra,* 426 U.S. at 112-113. *Vergara* v. *Hampton, supra,* 581 F.2d at 1284. This sentence is *dictum* which assumes, without deciding, that the President is authorized by §3301(1) to bar aliens from civil service employment. This assumption is expressed without any discussion or analysis whatsoever. But since the Court in *Mow Sun Wong* also held that the Civil Service Commission could not base an exclusion of aliens on §3301(1) in that such an exclusion fails to promote the efficiency of the service, the language relied upon by the Seventh Circuit is anomalous. In examining the *Mow Sun Wong* opinion one commentator labelled this language "puzzling" when read in context with the rest of the *Mow Sun Wong* decision. Note, *The Supreme Court, 1975 Term,* 90 Harvard Law Review 56, at 108 (1976). Lacking the nexus with the promotion of efficiency mandated by §3301(1), Executive Order 11935, like the Civil Service rule that preceded it, exceeds the parameters of that statute.

Furthermore, the *Mow Sun Wong* decision, to the extent it discussed the issue of statutory authorization, is inappo-

site. Unlike the plaintiffs in *Mow Sun Wong,* petitioners herein are aliens who are specifically authorized to receive compensation for employment in the federal civil service pursuant to Congress' annual Appropriation Acts.[7] Petitioner Vergara is a citizen of the Philippines, a nation whose citizens are specifically authorized by Congress in the Appropriation Acts, *supra,* to receive compensation for federal employment. Appropriation Act, *supra,* § 602. Similarly, as nationals of a country allied to the United States in the current defense effort, petitioners Renteria and Alatorre have also been authorized by Congress to be employed in the federal civil service. *Id.* Moreover, all three petitioners, having indicated by affidavit a willingness to swear allegiance to the United States, qualify to receive compensation as civil service employees under another category specified in the same Appropriation Act. *Id;* see also *Hampton* v. *Mow Sun Wong, supra* at 109. Significantly, the number of lawful permanent residents from nations whose citizens or nationals are authorized by Congress to be compensated for employment in the federal civil service or who are other otherwise by the Appropriation Acts to receive such compensation is in the millions.[8]

The Seventh Circuit's finding of congressional authority for Executive Order 11935 flies in the face of this express congressional authorization of the payment of salaries and other compensation for federal employment to the peti-

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[7] See n. 5, *supra* at 8.

[8] The number of permanent residents from Cuba, Poland, the Baltic countries, the Philippines and nations allied to the United States in the current defense effort alone number in the millions. See U.S. Dept. of Justice, 1976 *Annual Report: Immigration and Naturalization Service,* Table 34.

tioners in this action. This Court in *Mow Sun Wong* found force to the argument that the exemptions of the Appropriation Acts "had become so broad by 1969 as to constitute a congressional determination of policy repudiating the narrow citizenship requirement . . ." then contained in the Civil Service Commission Rule and now contained in Executive Order 11935. *Hampton* v. *Mow Sun Wong, supra* at 109. This Court clearly recognized that "Congress has consistently authorized payment [of salaries] to a much broader class of potential employees than the narrow category of citizens and natives of Samoa . . ." *Hampton* v. *Mow Sun Wong, id.* The dissent in *Mow Sun Wong* also noted the significance that the plaintiffs in that case did not, as do the petitioners herein, fit into any category of aliens which Congress has authorized to receive compensation for federal employment. *Hampton* v. *Mow Sun Wong, id.* at 125-126. The implication of this dissent is that aliens such as the petitioners herein who are authorized by Congress to receive compensation for federal employment cannot be barred from civil service employment, or were certainly not intended to be so barred by any Congressional enactment.

Not only is Executive Order 11935 without any statutory authorization, it is also unauthorized by any provision of the Constitution. In fact, the Seventh Circuit did not even allude to a constitutional authorization for the Order. Nor can an executive order be authorized as "implied from the aggregate of . . . [the President's] powers under the Constitution." *Youngstown Steet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 587 (1952).

Given the intent of Congress, as expressed in the Appropriations Acts and the absolute lack of statutory or constitutional authorization for the Executive Order, the President's exclusion of lawful resident aliens from the civil

service must fall. For the powers of the President ". . . must stem either from an act of Congress or from the Constitution itself," *Youngstown Sheet & Tube Co.* v. *Sawyer, id* at 585, and an executive order which exceeds a President's statutory and constitutional authority must be declared invalid. *Id.* Lacking such authorization, the President, in issuing Executive Order 11935, has exceeded the scope of his authority.

Furthermore, executive orders that effect a deprivation of important individual rights require explicit authorization. *Greene* v. *McElroy,* 350 U.S. 474, 506-507 (1959); *Kent* v. *Dulles,* 357 U.S. 116, 128-129 (1958). Statutes relied on as authority for the infringement of individual liberties have been narrowly construed by this Court. *Kent* v. *Dulles, supra,* 357 U.S. at 129; *Peters* v. *Hobby,* 349 U.S. 331, 345 (1954).

In barring all resident aliens from employment with the civil service, Executive Order 11935 impinges on a constitutional right which this Court has characterized as "a deprivation of an interest in liberty", *Hampton* v. *Mow Sun Wong, supra,* 426 U.S. at 102, and "the very essence of . . . personal freedom." *Truax* v. *Raich,* 239 U.S. 33, 41 (1915), cited in *Hampton* v. *Mow Sun Wong, supra* note 23 at 102. Where "substantial restraints on employment opportunities of numerous persons . . ." are imposed, this Court has demanded no less than "explicit action by lawmakers" as justification. *Greene* v. *McElroy, supra,* 360 U.S. at 506-507. Yet 5 U.S.C. §3301(1), which the Seventh Circuit indicated as the sole source of authority for Executive Order 11935, provides no authority whatsoever for the Order, let alone the clear statement necessary when important individual interests are at stake.

President Ford's promulgation of Executive Order 11935 raises substantial questions regarding the limits of executive power and the interplay among the Appropriations Acts, *supra*, 5 U.S.C. §3301(1) and the Order. Serious questions are also raised regarding the validity of the Order under the "express authorization doctrine" enunciated by this Court. Executive Order 11935, in its sweeping exclusion of aliens from the federal civil service, "does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President." *Youngstown Sheet & Tube Co.* v. *Sawyer, supra*, 343 U.S. at 588. Accordingly, it must be invalidated as exceeding the scope of the President's authority.

II.

THE DECISION BELOW RAISES SIGNIFICANT, RECURRING AND UNSETTLED QUESTIONS CONCERNING THE FIFTH AMENDMENT RIGHTS OF VARIOUS CLASSES OF LAWFUL PERMANENT RESIDENT ALIENS.

This case also presents an additional important question, one specifically reserved in *Hampton* v. *Mow Sun Wong, supra:* whether a Presidential ban on the employment of permanent resident aliens in the federal civil service would violate their rights under the equal protection guarantees of the Fifth Amendment Due Process Clause.[9] 426 U.S. at 114.

The Executive Order excludes several potentially distinguishable groups of lawfully-admitted permanent resident

[9] It is settled that the Fifth Amendment Due Process Clause comprehends a guarantee of equal protection of federal laws. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); see also *Examining Board* v. *Flores de Otero*, 426 U.S. 572 (1976).

aliens. These groups vary in their ability and willingness to become United States citizens, and in the types of federal jobs for which they desire to become eligible. The challenged order ignores these differences among permanent resident aliens, and discriminates against all of them. The Court of Appeals below identified certain national interests claimed to be served by the Order. However, it failed to disclose the standard by which it evaluated those interests, and gave no consideration to whether these interests, even if sufficient in some circumstances, might have been adequately served by a less restrictive order distinguishing among the various categories of permanent resident aliens, and/or among different types of federal jobs.

While a distinction drawn among categories of permanent resident aliens or types of federal jobs might pass constitutional muster,[10] Executive Order 11935 instead draws a broad line between citizens and resident aliens, barring aliens from all federal civil service jobs. Guidance is needed from this Court as to whether such a broad line properly balances the due process rights of permanent resident aliens against the interests of the federal government.

This Court already has recognized the constitutionally-protected nature of resident aliens' interest in eligibility for federal employment. *Hampton* v. *Mow Sun Wong, supra*, 426 U.S. at 102. While no decision was reached in *Mow Sun Wong* as to the sufficiency of the interests asserted by the federal government, the Court specified that only "overriding" federal interests could justify the exclusion of resident aliens from the Civil Service. *Id.* at 103.

[10] *Cf. Foley* v. *Connelie*, 435 U.S. 291 (1978); *Matthews* v. *Diaz*, 426 U.S. 67 (1976).

Shortly after its decision in *Mow Sun Wong,* a 7-to-1 majority of this Court, in *Examining Board* v. *Flores de Otero,* 426 U.S. 572 (1976), further articulated the standard to be applied in Fifth Amendment cases involving employment discrimination against aliens:

> We do not suggest, however, that a State, Territory, or local government, or *certainly the Federal Government,* may not be permitted some discretion in determining the circumstances under which it will employ aliens or whether aliens may receive public benefits or partake of public resources on the same basis as citizens. In each case, the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is *legitimate and substantial,* and inquiry must be made whether the means adopted to achieve the goal are *necessary and precisely drawn.* [Emphasis added] 426 U.S. at 604-605.

Contrary to this Court's opinion in *Flores de Otero,* the Court of Appeals below made no effort to "carefully examine" the interests asserted by the government, and gave no indication that those interests were either "legitimate" or "substantial." Instead, it merely stated, "[w]e believe . . . that the national interests asserted by the government to support the executive order, which the Supreme Court said in *Mow Sun Wong* might be sufficient, are sufficient, and that the Supreme Court would so hold." 581 F.2d at 128. The second half of the *Flores de Otero* test, "whether the means adopted to achieve the goal are necessary and precisely drawn," was never mentioned or applied by the Court of Appeals.

Four purported national interests were proffered by the government in *Mow Sun Wong* and mentioned in the majority opinion:

> (1) "the need for undivided loyalty in certain sensitive positions . . . and . . . the valid administrative purpose of avoiding the trouble and expense of classifying those positions which properly belong in executive or sensitive categories";
>
> (2) conformity with the practices of most other countries and with long-standing practice in the United States;
>
> (3) "provid[ing] an appropriate incentive to aliens to qualify for naturalization"; and
>
> (4) "Enabling [the President] to offer employment opportunities to citizens of a given foreign country in exchange for reciprocal concessions, an offer he would not make if those aliens were already eligible for federal jobs." (hereinafter, the "bargaining chip" rationale). 426 U.S. at 104.

Petitioners agree that certain important and sensitive federal jobs may legitimately necessitate United States citizenship, and would have no objection to the government's retaining the citizenship requirement for those positions. However, the "trouble and expense of classifying those positions" is hardly an adequate justification for the challenged Order, especially since the work of classifying them would be a one-time administrative task, and hence minimal. See *Reed* v. *Reed,* 404 U.S. 71 (1971) (mandatory sex preference in appointment of administrators to avoid the expense of hearings on the merits violated equal protection). Nor does the practice of "most other countries," or the fact that the practice went unchallenged here for many years, save the citizenship requirement from constitutional attack. *Wong* v. *Hampton,* 500 F.2d 1031, 1040 (9th Cir. 1974).

The Court of Appeals relied on the last two interests cited—the "incentive for naturalization" and "bargaining chip" rationales—in upholding Executive Order 11935. 581 F.2d at 1286. However, a majority of this Court in *Nyquist* v. *Mauclet,* 432 U.S. 1 (1972), rejecting the latter rationale, stated, "[i]f the encouragement of naturaliza-

tion through these programs were seen as adequate [to justify the statute], then every discrimination against aliens could be similarly justified." 432 U.S. at 11. See also, Rosberg, *The Protection of Aliens From Discriminatory Treatment by the National Government,* 1977 Sup.Ct. Rev. 275, 314-315. Moreover, as to those resident aliens who cannot yet become citizens, but who have formally declared their intent to do so, such "encouragement" has no logical function.[11]

Similarly, the "bargaining chip" rationale could be used to justify any discrimination against resident aliens. Every disability placed on aliens encourages them to cast off that disability by becoming citizens and every such disability conceivably gives the President one more bargaining chip to use in negotiations with foreign countries. It is, however, not in accordance with American policy or tradition to hold resident aliens for ransom by their countries of origin. Rosberg, *id* note 146 at 314. Moreover, the "bargaining chip" rationale gives no recognition to the fact that Congress in the Appropriation Acts, *supra,* has authorized the employment in the federal civil service of citizens and nationals of certain specified countries, including nations with whom the United States is allied by treaty in the current defense effort as well as the Philippines, Cuba, Poland, the Baltic Countries, and South Vietnam. By barring the employment in the federal civil service of aliens from nations whose citizens or nationals are authorized to be compensated for civil service employment, the Executive Order runs contrary to

[11] A resident alien generally must be a permanent resident for five years prior to initiating a petition for naturalization. 8 U.S.C. §1427(a). However, a declaration of intent to become a citizen may be filed by any permanent resident eighteen years of age or older. 8 U.S.C. §1445(f).

the intention of Congress. Certainly, in this context the "bargaining chip" rationale cannot serve as a substitute for the "legitimate and substantial" national interest required by this Court in *Flores de Otero.*

Even if a legitimate and substantial national interest could be found to support some ban on the employment of aliens in the federal civil service, Executive Order 11935 is hardly "precisely drawn" to effectuate it. As stated above, permanent resident aliens vary in their willingness and ability to become citizens. Nevertheless, the Executive Order disqualifies all permanent resident aliens, including those aliens who have filed declarations of intent to become citizens or taken oaths of allegiance to the United States, and those who are not yet eligible for citizenship.[12]

Nor does the challenged Order distinguish according to the job desired or the relative abilities of alien and citizen applicants. In *Mow Sun Wong,* this Court suggested that certain "important and sensitive" positions could be reserved for U.S. citizens, a suggestion with which petitioners do not take issue. 426 U.S. at 115. Similarly, in *Foley*

[12] The four members of this Court who dissented in *Mow Sun Wong,* despite their vote to uphold the challenged Civil Service Commission rule excluding aliens, suggested that had the individual plaintiffs in that case sufficiently demonstrated their allegiance to the United States, they would have been eligible to be considered for employment in the federal civil service pursuant to the Appropriations Acts, *supra.* 426 U.S. at 125. Similarly, in *Nyquist* v. *Mauclet, supra,* striking down a New York statute requiring citizenship or a declaration of intent to become a citizen in order to receive state college scholarships, the dissent suggested that discrimination against all aliens as a class would merit stricter judicial scrutiny than discrimination between aliens who had declared their intent to become citizens and those who had not. 432 U.S. at 15.

v. *Connelie,* 435 U.S. 291 (1978), this Court held that a state could require citizenship for "those 'important non-elective executive, legislative and judicial positions,' held by 'officers who participate directly in the formulation, execution or review of broad public policy.' " at 435 U.S. at 296, citing *Sugarman* v. *Dougall,* 413 U.S. 634, 647 (1973). The Order, however, far exceeds these parameters, applying to lower level positions such as typists, office assistants, carpenters, and janitors.[13] See *Wong* v. *Hampton, supra,* 500 F.2d at 1040. It excludes permanent resident aliens regardless of their skills and qualifications for such jobs, and prevents them from taking the competitive examinations for those positions, thus denying them an opportunity to prove themselves better qualified than citizen applicants.

The Ninth Circuit's analysis in *Wong* v. *Hampton, supra,* of the Civil Service rule invalidated in *Mow Sun Wong,* applies equally to Executive Order 11935: it is "an instance of overbreadth," which "unreasonably discriminate[s] against resident aliens based solely on their status as aliens." 500 F.2d at 1040. Rather than exclude aliens from positions determined to involve discretionary decision-making or execution of policy, or from "some important and sensitive positions", Executive Order 11935 effectively excludes all aliens from all federal civil service positions. It does not distinguish among jobs, *cf. Foley* v. *Connelie, supra,* nor even among aliens, as did the statute upheld in *Mathews* v. *Diaz,* 426 U.S. 67 (1976), but applies

[13] Over fifty percent of General Schedule Civil Service positions are in Grades 1-8 and are of a clerical, secretarial, or custodial nature. Eighteen percent of all federal employees are in blue collar positions, including trade, craft, and labor occupations. Percentage figures derived from U.S. Civil Service Commission, *Civil Service News,* Table 2 (May 2, 1978).

to low-level positions as well as to policy-makers, to aliens declaring their intent to become citizens as well as to those with less substantial ties to the United States, and to aliens willing to take an oath of allegiance as well as to those unwilling to do so. Such a total exclusion is overbroad and demands the close scrutiny of this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

ALAN A. ALOP
ARNOLD S. ROSENBERG
18th Street Neighborhood Legal Services
Legal Assistance Foundation of Chicago
1661 South Blue Island Avenue
Chicago, IL 60608

KALMAN D. RESNICK
Legal Services Center for Immigrants
Legal Assistance Foundation of Chicago
1661 South Blue Island Avenue
Chicago, IL 60608

Of Counsel:
KENNETH MONTGOMERY
Central Pennsylvania Legal Services
10 South Prince Street
Lancaster, PA 17603

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-2101

RONALD VERGARA, et al.,

Plaintiffs-Appellants,

v.

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73-C-2537—James B. Parsons, *Chief Judge.*

Argued April 18, 1978—Decided August 24, 1978

Before PELL and TONE, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

TONE, *Circuit Judge.* In *Hampton* v. *Mow Sun Wong,* 426 U.S. 88 (1976), the Court held that a Civil Service Commission regulation barring lawfully admitted resident

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* The Honorable William J. Campbell, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

aliens from the federal competitive civil service deprived those aliens of due process rights. In so holding, the Court assumed but did not decide that the same bar would not be unconstitutional if it were imposed by Congress or the President. The President then issued an executive order renewing the bar.[1] The question before us is the validity of that order. Two district courts, one deciding the *Mow Sun Wong* case on remand, and the other a three-judge court in the First Circuit, have held the order valid. *Mow Sun Wong* v. *Hampton,* 435 F.Supp. 37 (N.D. Cal. 1977), appeal pending, 9th Cir., No. 77-2649; *Santin Ramos* v. *U.S. Civil Service Commission,* 430 F.Supp. 422 (D. P.R. 1977) (District Judge Toledo, with Circuit Judge Campbell and District Judge Pesquera). We reach the same result.

Plaintiffs are three lawfully admitted resident aliens who allege that they wish to take civil service examinations for federal employment, one as an auditor, the second as an office assistant, and the third as a carpenter. One

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[1] President Gerald R. Ford issued Executive Order 11935, 41 Fed. Reg. 37301, on September 2, 1976, three months after the Supreme Court handed down its *Mow Sun Wong* decision. The order amended Civil Service Rule VII, 5 C.F.R. § 7.4, to provide as follows:

> (a) No person shall be admitted to competitive examination unless such person is a citizen or national of the United States.
>
> (b) No person shall be given any appointment in the competitive service unless such person is a citizen or national of the United States.
>
> (c) The Commission may, as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of the service in specific cases or for temporary appointments.

of them has executed a declaration of intent to become a United States citizen. All aver that they are prepared to swear permanent allegiance to the United States. They allege that the executive order exceeds the President's constitutional and statutory authority and violates 42 U.S.C. § 1981 and the due process clause of the Fifth Amendment. Plaintiffs seek to represent a class consisting of all lawfully admitted aliens residing in Illinois who desire civil service employment. The District Court denied class status and, pursuant to defendants' motions to dismiss and for summary judgment, entered judgment against plaintiffs.[2]

In the executive order, the President stated that he was acting "[b]y virtue of the authority vested in [him] by the Constitution and statutes of the United States," including 5 U.S.C. §§ 3301 and 3302. The order is explained in identical letters of the same date, September 2, 1976, from the President to the Speaker of the House of Representatives and the President of the Senate, in which the President described the *Mow Sun Wong* case as stating "that either the Congress or the President might issue a broad prohibition against the employment of aliens in the civil service, but [holding] that neither the Congress nor the

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[2] The action was originally brought by plaintiff Vergara challenging the same Civil Service Commission regulation that was found invalid in *Mow Sun Wong.* The District Court dismissed the action. During the appeal from that order, *Mow Sun Wong* was decided by the Supreme Court, and this Court therefore vacated the judgment of dismissal and remanded to the District Court. While the case was pending there the executive order in issue here was adopted. Plaintiffs Renteria and Alatorre then joined in the action, and an amended complaint challenging the executive order was filed.

President had mandated the general prohibition contained in the regulations of the Commission."[3]

I.

Class Representation

The first question is whether the District Court properly refused to allow the action to proceed as a class action. Plaintiffs sought to bring the action on behalf of themselves "and all other nationals and citizens of foreign states living in Illinois who have been admitted into Illinois for permanent residence and who desire to apply and be eligible for appointment in the United States Civil Service."

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[3] The President further stated that he had concluded that

> [I]t is in the national interest to preserve the long-standing policy of generally prohibiting the employment of aliens from positions in the competitive service, except where the efficiency of the service or the national interest dictate otherwise in specific cases or circumstances. It is also my judgment that it would be detrimental to the efficiency of the civil service, as well as contrary to the national interest, precipitously to employ aliens in the competitive service without an appropriate determination that it is in the national interest to do so. Therefore, I am issuing an Executive order which generally prohibits the employment of aliens in the competitive service.

The President also referred to "existing statutes which often discriminate between citizens and categories of aliens with respect to various rights, duties, and benefits." He said that "statutes pertaining to the Federal employment of aliens further discriminate as to specific jobs, agencies, or the nationality of aliens." He also stated that he was "mindful that the Congress has the primary responsibility with respect to the admission of aliens into, and the regulation of the conduct of aliens within, the United States," and that although he was exercising the "constitutional and statutory authority vested in [him] as President," he urged that Congress promptly address the matter.

We hold that plaintiffs were entitled to a class determination in their favor.

The prerequisites to bringing a class action under Rule 23(b)(2), Fed. R. Civ. P., were established. The sole purpose of this action is to determine a legal question which is common to every member of the proposed class, who are in the same position with respect to that question as are plaintiffs.[4] It was unnecessary in circumstances such as these to establish that every member of the class "desired" to obtain Civil Service employment. *Cf. Sosna* v. *Iowa*, 419 U.S. 393, 397 (1975). The numerosity requirement was satisfied by the census figures as to resident aliens in Illinois and the number of federal Civil Service positions in that state.[5] *Cf. Senter* v. *General Motors Corp.*, 532 F.2d 511, 522-523 (6th Cir. 1976). The difficulty in determining the exact number of class members does not preclude class certification. *Doe* v. *Charleston Area Medical Center, Inc.*, 529 F.2d 638, 644-645 (4th Cir. 1975). *Cf. Jones* v. *Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975). Finally, whatever may be the rule elsewhere, see *Martinez* v. *Richardson*, 472 F.2d 1121, 1127 (10th Cir. 1973); *Ihrke* v. *Northern States Power Co.*, 459 F.2d 566, 572 (8th Cir.), *vacated on other grounds*, 409 U.S. 815 (1972), the rule in this circuit is

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[4] Although the class description does not limit the class to those who have filed declarations of intent to become citizens or those who have declared their willingness to swear permanent allegiance, the executive order under attack does not make any distinction, and the United States does not seek to justify the order, on either of these bases. In these circumstances redefinition of the class is unnecessary, although the result might be otherwise if during the course of the litigation either or both of these factors were to become relevant.

[5] *U.S. Bureau of the Census Statistical Abstract of the United States: 1976* (97th ed.) Washington, D.C. 1976, at 109 and 252.

that class certification may not be denied on the ground of lack of "need" if the prerequisites of Rule 23 are met. *Fujishima* v. *Board of Education,* 460 F.2d 1355, 1360 (7th Cir. 1975), *Vickers* v. *Trainor,* 546 F.2d 739, 747 (7th Cir. 1976). Accordingly, this action will proceed as a class action.

II.

The President's Constitutional and Statutory Authority

Plaintiffs' first ground of attack on the executive order is that issuance of the order was beyond the President's constitutional and statutory authority. We agree with Judge Peckham's answer to this same argument in his opinion on remand in the *Mow Sun Wong* case, *supra,* 435 F.Supp. at 41-42, *viz.*, that the question of authority was settled by the Supreme Court's opinion in that case.

The controlling question in the Supreme Court's analysis in *Mow Sun Wong* was whether the national interests asserted by the government to justify the Civil Service Commission's citizenship requirement, 426 U.S. at 103-104, were interests on which that agency could properly rely as a basis for that requirement, *id.* at 113-114. The Court held that they were not, *id.* at 114-116, and that therefore the adoption of the citizenship requirement deprived the plaintiff aliens of a liberty interest without due process, *id.* at 116.

In order to reach that controlling question, it was necessary to determine, *inter alia,* whether Congress had authorized the President, who had delegated his authority to Civil Service Commission, to adopt the citizenship requirement. The respondent aliens had argued in their brief in the Supreme Court that Congress had not so authorized the President. Brief for Respondent in *Hampton*

v. *Mow Sun Wong,* 426 U.S. 88 (1976), at 53, *et seq.* The Court held, 426 U.S. at 112-113, that Congress had done so through 5 U.S.C. § 3301(1), which gives the President the authority to "prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service." The President in turn had delegated the authority to the Commission.[6] If the Court had believed the statutory delegation to the President was insufficient to authorize the regulation, the case would presumably have been decided on that statutory ground, and the Court would not have reached the constitutional issue. *See Jalil* v. *Hampton,* 460 F.2d 923, 927 (D.C. Cir), *cert. denied,* 409 U.S. 887 (1972) (question of Civil Service Commission's authority under 5 U.S.C. § 3301 and Executive Order No. 10,577 to adopt the regulation later held unconstitutional in *Mow Sun Wong* must be determined before reaching constitutional issue); *see also Ashwander* v. *TVA,* 297 U.S. 288, 341, 347, 348 (1936) (Brandeis, J., concurring). We need not rely on this presumption, however, because the Court stated that it had "no doubt" that the statute and the executive order gave the Commission discretion "either [to] retain or modify the citizenship requirement without further authorization from Congress or the President." 426 U.S. at 113. Clearly, then, the statute granted authority to the President, which he had delegated to the Commission before *Mow Sun Wong* but has now exercised himself. to impose the citizenship requirement.

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[6] Executive Order No. 10,577, §2.1(a), 3 C.F.R. 218, 219 (1954-1958 Comp.) The order authorized the Commission "to establish standards with respect to citizenship," *inter alia,* which the Court said was not necessarily a command to make citizenship a prerequisite but was at least equally "susceptible of interpretation as a command to classify positions for which citizenship should be required." 426 U.S. at 112.

III.

Section 1981

Plaintiffs argue that the executive order violates 42 U.S.C. § 1981, derived from § 16 of the Civil Rights Act of 1870, 16 Stat. 140, 144, which provides in pertinent part as follows:

> All persons . . . shall have the same rights . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . .

The argument is that aliens are among the persons protected from discrimination by § 1981, *Graham* v. *Richardson*, 403 U.S. 365, 377 (1971); that the section is applicable to the federal government and its officials, *City of Milwaukee* v. *Saxbe*, 546 F.2d 693, 703 (7th Cir. 1976); that the section applies to discrimination in employment generally, including federal employment, *Bowers* v. *Campbell*, 550 F.2d 1155, 1157 (9th Cir. 1974); and that the President is subject to a valid act of Congress. This argument seems not to have been presented in *Mow Sun Wong* or the two cases holding the executive order valid (cited in the first paragraph of this opinion).

We reject the argument. If, as the Supreme Court concluded in *Mow Sun Wong*, 5 U.S.C. § 3301(1) confers authority on the President to impose a citizenship requirement for the federal civil service, 42 U.S.C. § 1981 is presumably inapplicable to such a requirement. Moreover, for at least the past forty years, Congress itself has adopted a setries of enactments excluding, in varying degree, aliens from the federal civil service.[7] In view of its

[7] The following legislation has proscribed the use of appropriated funds to compensate aliens employed by the federal government whose post of duty is in the United States: Second Deficiency Ap-

(footnote continued)

failure to take note of §1981 in considering and adopting these statutes inconsistent with the interpretation of § 1981 urged here, it is unlikely that Congress has ever considered that section applicable to the citizenship qualification for federal civil service. In addition, as the Supreme Court noted in *Mow Sun Wong*, Congress has acquiesced for over a century in the imposition of citizenship requirements by the Civil Service Commission and other agencies, and although this acquiescence cannot be viewed as express approval, it is at least another indication that Congress has never viewed the citizenship requirement as contravening a federal statute. *Cf. Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973).[8] In view of this

(footnote continued)

propriation Act, 1938, 52 Stat. 1162; Treasury-Post Office Appropriation Act, 1939, 52 Stat. 148; Treasury, Postal Service, and General Government Appropriation Act, 1973, Pub. L. 82-351, 86 Stat. 471, § 602; Treasury, Postal Service, and General Government Appropriation Act, 1975, Publ. L. 93-143, 87 Stat. 510, § 602; Treasury, Postal Service, and General Government Appropriation Act, 1975, Pub. L. 93-381, 88 Stat. 613, § 602; Department of Defense Appropriation Act, 1976, Pub. L. 94-212, 90 Stat. 153 § 753; Department of Defense Appropriation Act, 1977, Pub. L. 94-419, 90 Stat. 1299, § 750; Treasury, Postal Service and General Government Appropriation Act, 1978, Pub. L. 95-81, 91 Stat. 341 § 602.

[8] *Espinoza* held that § 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), which proscribes discrimination in private employment or the basis of "national origin," did not proscribe discrimination based on alienage. Part of the Court's reasoning included a reference to § 701(b) of that Act, 5 U.S.C. § 7151, which makes it "the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of .. . national origin . . .," which it juxtaposed with the "longstanding practice of requiring Federal employees to be United States citizens," and hence concluded that Congress would not make unlawful that which it practiced itself.

history, we are unable to hold § 1981 applicable to the citizenship requirement for the federal civil service.

IV.

Due Process

Mr. Justice Stevens' opinion for the majority in *Mow Sun Wong* "assume[d], without deciding," 426 U.S. at 114, that the President may lawfully exclude aliens from the civil service. Justices Brennan and Marshall, whose approval of that opinion was necessary to make it an opinion of the Court, joined in it with the express understanding that the constittuional question was reserved. *Id.* at 117. Nevertheless, there seem to us to be strong indications that the Court would sustain the President's power. The four dissenting justices, who thought the Civil Service Regulation valid, would, *a fortiori,* hold the executive order valid. A careful reading of the majority opinion convinces us that, notwithstanding the express reservations of two of the justices, at least some members of the majority would reach a different conclusion with respect to the validity of the executive order than they did with respect to the validity of the regulation. We note the recognition "that overriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State,"[9] *id.* at 119, and the Court's view that the argument in favor of the Commission's regulation "draws support from both the federal and the political character of the power over immigration and naturalization." *Id.* The latter proposition is underscoreed by the Court's unanimous decision the same day in *Mathews* v. *Diaz,* 426 U.S. 67 (1976), which sustained the constitutionality of a federal statute that limited Medicare eligibility to citizens and to aliens who had filed an application for permanent residence and had continuously resided in the United States for at least five years. Compare *Graham* v. *Richardson, supra,* 403 U.S. at 376, which invalidated a state's conditioning an alien's eligibility to receive welfare benefits on residence in United States for fifteen years. The Court in *Mow Sun Wong* also "assume[d] with the petitioners that if the Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating purposes . . .." 426 U.S. at 196; *see also, id.* at 116. Also the Court remarked that "if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption," *id.* at 103, a presumption that would make it unnecessary for the defenders of the order to demonstrate what in fact gave rise to the adoption of the ban. Finally, the concluding paragraph of the opinion contains the following sentence:

> Since these residents were admitted as a result of decisions made by the Congress and the President, implemented by the Immigration and Naturalization Service acting under the Attorney General of the United States, due process requires that the decision to impose that deprivation of an important liberty be made *either at a comparable level of government* or, if it is

[9] The federal power is not, however, "so plenary that any agent of a national government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens." 426 U.S. at 101.

to be permitted to be made by the Civil Service Commission, that it be justified by reasons which are properly the concern of that agency.

426 U.S. at 116 (emphasis supplied). Leaving out the alternative of the Civil Service Commission's decision to impose the citizenship requirement, the quoted sentence states that because the plaintiff aliens were admitted as the result of decisions made by Congress and the President, due process requires that the decision of whether to deny them the right to federal civil service employment while they remain resident aliens must be made "at a comparable level of government," which we understand to mean either Congress or the President. That requirement is satisfied by the executive order.

Elsewhere in the Court's opinion, as we have said, the question of whether due process imposes still other requirements is reserved. We believe, however, that the national interests asserted by the government to support the executive order, which the Supreme Court said in *Mow Sun Wong* might be sufficient, are sufficient, and that the Supreme Court would so hold.

It is unnecessary, we believe, to say more. Because the constitutionality of the citizenship requirement has so recently received intensive consideration from the Supreme Court, and, no doubt, will soon be before the Court again, a further discussion of that subject in this opinion would be of little value to the Court or others.

AFFIRMED AS MODIFIED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeal for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RONALD VERGARA, ESTHER RENTERIA, JAIME ALATORRE, individually and on behalf of all other similarly situated,

Plaintiffs,

vs.

ROBERT E. HAMPTON, Chairman GEORGIANA SHELDON and L. J. ANDOLSEK, Commissioner, United States Civil Service Commission, and DONALD A. ALEXANDER, Chairman of the Internal Revenue Service,

Defendants.

NO. 73 C 2537

MEMORANDUM OPINION AND ORDER

In their second Amended Complaint, plaintiffs purport to bring a class action seeking declaratory and injunctive relief whereby three lawfully-resident aliens of the United States allege, in essence, that certain Civil Service Regulations, 5 C.F.R. § 7.4 and 302.203(g) and Chapter 338.1 of the Federal Personnel Manual, and Executive Order 11935 violate the Fifth Amendment; the Civil Rights Act of 1866 as amended, 42 U.S.C. § 1981; and exceed the bounds of Presidential authority in 5 U.S.C. § 3301, 3303, the Civil Service Act, and Art. II, §1, clause 1 and § 2, clause 2 of the United States Constitution. Defendants are the Chairman and Commissioner of the U. S. Internal Revenue Service and of the U.S. Civil Service Commission, respectively; the President has been dismissed from the action.

At the time the original complaint was filed, a federal job applicant was required to undergo a qualifying examination, which must be completed prior to appointment by the Civil Service Commission (CSC); only United States citizens were permitted to take the examination. Hence, a federal question being raised, jurisdiction was granted on that basis under 28 U.S.C. § 1331.

For reasons stated of record on January 30, 1974, I dismissed this cause; however, on July 14, 1976, that judgment was vacated and remanded to me by the Seventh Circuit Court of Appeals, inasmuch as the Civil Service Regulation which controlled the appointment process had been declared unconstitutional by the U. S. Supreme Court in *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976). I now decide that CSC Regulation 338.101(a) is invalid. *Id.* at 116-117.

Subsequent to, and in accordance with, the requirements of the Supreme Court's *Mow Sun Wong* decision, President Gerald Ford isued Executive Order 11935 on September 2, 1976, 41 Fed. Reg. 37301, which amended Civil Service Rule VII, 5 C.F.R. § 7.4, to provide:

"Section 7.4 Citizenship.

(a) No person shall be admitted to competitive examination unless such person is a citizen or national of the United States.

(b) No person shall be given any appointment in the competitive service uness such person is a citizen or national of the United States.

(c) The Commission may, as an exception to this rule and to the extent permitted by law, authorize the appointment of aliens to positions in the competitive service when necessary to promote the efficiency of

the service in specific cases or for temporary appointments."

Now pending before me are cross motions for summary judgment by the resident aliens and by the United States Civil Service Commission and the Internal Revenue Service (the Government), under Federal Rule of Civil Procedure 56, on the second Amended Complaint as to the specific issue of the validity of Executive Order 11935.

I.

The threshold question is whether, in the first instance, plaintiffs may proceed as a class action under Federal Rules of Civil Procedure 23. Plaintiffs pray that the class be composed of:

"All nationals or other foreign citizens who have been admitted into the United States for permanent residence and who desire an opportunity to apply for the appointment in the Civil Service."

After carefully reviewing the entire record, I find that the prerequisites to a class action which are set out in Rule 23 have not been met. Merely to state the proposed limits of plaintiffs class is to illustrate its inappropriateness. Such a class is simply unwieldly. The three individually-named plaintiffs are Philippine citizens who became lawfully resident aliens of the United States and who now live in Chicago. Named plaintiffs, Filipinos all, are unrepresentative of "all (foreign) nationals . . . living in Illinois." Furthermore, those who desire to apply and to be eligible for CSC appointment may be many or few in number—I certainly have no objective manifestation of any person's "desire" whether they be a foreign national a resident alien, or even a citizen.

More particularly, I find that the class here proposed (if plaintiffs really mean Filipinos who have applied for, but have been denied access to a CSC examination), may not be so numerous as to preclude joinder. Also, the claims of the three named parties are somewhat divergent as to the underlying facts and hence, may not be representative or typical of those persons in the putative class. In fact, individual questions may predominate over those affecting the class—the reverse of Rule 23's requirements. As noted *infra,* not all resident aliens are blanketly and uniformly barred from civil service employment by the challenged Executive Order. Finally, and perhaps more importantly, assuming that plaintiffs are able to establish their case on the merits, declaratory or injunctive relief may nonetheless be possible without the 'necessity'' for certification of such a broadly-defined class as that proposed. See 3B *Moore's Federal Practice* ¶ 23.05, page 271.

I therefore deny plaintiffs' prayer to certify the proposed class; the case at bar will be henceforth treated as a suit by the three individually-named plaintiffs.

II.

As aforementioned, *Mow Sun Wong, supra,* is dispositive of the challenge to CSC Regulation 338.101(a), which is now clearly unconstitutional, under the Fifth Amendment. Hence, the only issue left for decision today is the validity of Executive Order 11935. I now find that the Order does not violate the Fifth Amendment, the Civil Rights Act of 1866, as amended, nor is there an absence of Presidential authority.

Plaintiffs argue that to adequately support its motion for summary judgment, the Government mistakenly relies on *Mow Sun Wong* v. *Hampton,* No. C-70-2730 (N.D. Cal.,

March 31, 1977) a decision on remand to the California court; on *Ramos* v. *United States Civil Service Commission,* No. 63-73 (D.P.R. February 16, 1977); and on *Jalil* v. *Hampton,* No. 3686-69 (D.D.C. March 31, 1977). I disagree.

In the Supreme Court's *Mow Sun Wong, opinion, supra,* Justice Stevens may or may not have expressly concluded that the national interest adequately justified exclusion of non-citizens from government employment.[1] It is my belief that the history of the post-Civil War Congressional enactments and constitutional amendments, together with the compelling rationale advanced by the President in his letter explaining the Executive Order of September 2, 1976, require that I grant defendants' motion for summary judgment on all counts. *See* F.R.Doc.—76-26190, 26191.

Consideration of the national interest in efficient government service and a stable work force may, in ''specific cases or circumstances'' and upon an ''appropriate determination'' mandate appointment of certain categories of aliens or their temporary employment through the CSC. There is no blanket exclusion of all aliens from all competitive positions as plaintiffs would have me believe.

Congress has the primary constitutional responsibility as regards admission and regulation of aliens in the United States. Hence, Executive Order 11935 may be seen merely as a ''stopgap'' measure to prompt Congress into exercising its responsibility in this area. As such, neither the equal protection guarantees of the Due Process Clause of the Fifth Amendment, nor Art II § 1, cl. 1, nor § 2, cl. 2 of the United States Constitution have been violated by the President's promulgation of the Executive Order now in question.

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[1] I note that *Ramos* v. *U.S.CSC, supra,* interpreted Justice Stevens' opinion to mean that the national interest questions had actually been denied.

Furthermore, 5 U.S.C. §§ 3301 and 3302 expressly authorize the President to make certain exceptions to the requirement of competitive examinations. Such a grant of authority is sufficiently broad to support implementing CSC Rules or Regulations. As the Supreme Court observed in *Mow Sun Wong,*

> "We have no doubt that the statutory directive which merely requires such regulations "as will best promote the efficiency of (the) service,' as well as the pertinent Executive Order, gives the Civil Service Commission . . . discretion . . . The Commission may either retain or modify the citizenship requirement without further authority from Congress or the President." 406 U.S. 112-113.

Such succinct language offers clear support for my decision today that the Executive Order was not promulgated without authority.

I also note that in most immigration and naturalization matters, the courts have historically deferred to the Executive and Legislature branches of government. Such decisions are essentially political and, general speaking, should be left undisturbed absent clear violation of authority.

The federal interest, in encouraging naturalization or in securing reciprocal treaty rights for United States citizens living abroad, may be balanced against any burden or deprivation to non-resident aliens. Justice Stevens remarked in *Mow Sun Wong, supra,* at 105, that

> "We may assume . . . that if Congress or the President had expressly imposed the citizenship requirement, it would be justified by the national interests in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expandable token for treaty negotiations."

These national interests, at the very minimum, provide some reasonable or rational basis under the Fifth Amendment for Executive Order 11935. *C.f., San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 40 (1973); *Sugarman* v. *Dugall,* 413 U.S. 633, 642 (1974); *In Re Griffiths,* 413 U.S. 717, 721 (1923).

III.

Finally, plaintiffs challenge the Executive Order under 42 U.S.C. § 1981, the Civil Rights Act of 1866 (Act), as amended, which provides that

> "All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."

I find that although aliens may arguably be within the scope of the Act as applied to the federal government, the President's policy in generally requiring citizenship as a prerequisite to employment by the federal government is permissible. *See Baker* v. *F&F Investment Company,* 489 F.2d 829, 833 (7th Cir. 1973); *C.f., Robinson* v. *Conlick,* 388 F.Supp. 529 (N.D. Ill. 1974) (where Judge Prentice Marshall held that § 1981 banned employment discrimination by both private and public employers.)

Once more I emphasize that the "separation of powers" doctrine permits the Executive branch to implement enactments of the Legislative branch of government or, as in this case, to step in where Congress has failed to exercise its constitutional responsibility. U.S. Const. Art. II § 3. Executive Order 11935 does no more than that. In fact, the President has acted only upon noting Congressional inaction after the Supreme Court rendered its *Mow Sun Wong* decision. His Executive Order was published

in the Federal Register as an obvious signal to Congress that it has primary authority in the area of immigration and naturalization which the President duly recognized. The President did no more than actually seemed necessary. This case must be seen in its historical context.

42 U.S.C. § 1981 must be recognized as one of the post-Civil War statutes which, together with the Thirteenth, Fourteenth, and Fifteenth Amendments, were intended by Congress to extend to newly-freed slaves status of equal citizenship "as is enjoyed by white citizens." No longer would individual state decisions as to citizenship be determinative of whether or not a person could become a citizen of these United States, i.e., a federal citizen. *See Slaughter Houses cases,* 83 U.S. 136 (1873); *U.S.* v. *Wong Kim Ark,* 169 U.S. 649 (1898).

One's status as a resident alien may be seen as a temporary step in the "gestation process" toward full United States citizenship. There are only two sources of United States Citizenship contemplated by § 1 of the Fourteenth Amendment: birth and naturalization. *Elk* v. *Wilkins,* 112 U.S. 94, 5 S.Ct. 41; *Wong Kim Arg, supra.*

Since the post-Civil War enactments, it has been left to the federal government and to the Congress in particular, to determine the necessary attributes, the definition and constitution of, and the rights and privileges stemming from, United States citizenship. The very word "citizen" is used in the Fourteenth Amendment in a political sense to designate those having the rights and privileges of citizens of either the United States as a whole or of a particular state. Such a policy determination—in essence a political act—is the underlying question presented by petitioners. Perhaps plaintiffs' argument might be best presented to Congress.

It is the nature of the unique American experiment in self-government, an aspect of which we refer to as "separation of powers" that permits me to conclude that neither the Fifth Amendment nor Art. II of the United States Constitution nor the Civil Rights Act of 1866, as amended, have been offended.

WHEREFORE, I ORDER, ADJUDGE AND DECREE that plaintiffs' Motion to Certify a class is denied and that defendants' Motion for Summary Judgment on all counts of plaintiffs' Second Amended Complaint be, and now is, granted, there being no issue of material fact to be resolved. Civil Service Regulation 338.101(a) is hereby declared unconstitutional and its enforcement or use is hereafter prohibited in this District.

ENTER:

.....

James B. Parsons
Chief Judge
United States District Court
Norther District of Illinois

Dated this ..... day of July, 1977, at Chicago, Illinois.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 27, 1978

Before

Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

RONALD VERGARA, et al.,
Plaintiffs-Appellants,

No. 77-2101 vs.

ROBERT E. HAMPTON, etc., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 73-2537
James B. Parsons, *Chief Judge*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable William J. Campbell, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

APPENDIX D

DEPARTMENT OF STATE
Washington, D.C. 20520

April 14, 1978

Mr. Frank Fuentes, Jr.
Chairperson
Employment Task Force
United States Civil Service Commission
Washington, D.C. 20415

Dear Mr. Fuentes:

This is in response to your letter of April 11 requesting a determination from the Department of State with respect to the Latin American countries considered to be allied to the United States in the current defense effort.

You are correct in your understanding that those states which are signatories of the Rio Pact qualify as current allies. In addition to the United States, the following states are parties to that treaty:

Argentina	Guatemala
Bolivia	Haiti
Brazil	Honduras
Chile	Mexico
Colombia	Nicaragua
Costa Rica	Panama
Cuba	Paraguay
Dominican Republic	Peru
Ecuador	Trinidad & Tobago
El Salvador	Uruguay
	Venezuela

Sincerely,

Arthur W. Rovine
Assistant Legal Adviser
for Treaty Affairs